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LIABILITY OF RECEIVING CARRIER FOR LOSS BEYOND ITS OWN LINE—CONSTITUTIONALITY OF THE VIRGINIA ACT.

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If, as Judge Martin is reported to have held (11 Va. L. Reg. 215), section 1294*l* of the Code is unconstitutional, then all shippers of goods in this state ought to be advised just where they stand, for their situation would seem to be a most unsatisfactory one. The statute in question, known as the "Claytor Law," after its patron, the late Senator Graham Claytor, of Bedford, was designed to make a receiving carrier liable for the loss of property, whether occurring on its own or a connecting line. Such a law commends itself to right reason and is necessary to the ends of justice under modern conditions. Hence, an urgent demand for it has gone up all over the country, and the states are exerting themselves to provide a remedy. The will of the people in this matter should not and will not long be thwarted by constitutional objections. If relief cannot be attained in one way it must come in another. Astute as are the railroads in taking care of themselves at the expense of their patrons, the latter have only to persevere if they would secure the protection which Senator Claytor sought to give them. A brief history of the case may be interesting:

In some states the courts had held that, in the absence of a special agreement to the contrary, the initial carrier was at common law responsible for the safe carriage of goods to their destination. This was also the English doctrine. But our own Court of Appeals some years ago adopted a different rule, holding that, without a special contract providing otherwise, the liability of a common carrier is limited to its own route. (*McConnell* v. *Ry. Co.*, 86 Va. 248; opinion by Fauntleroy, J., Richardson and Hinton, JJ., dissenting.) In order to obviate the hardship im-

posed by such a rule the learned revisors, Riely, Staples, and Burks, brought into our Code of 1887 section 1295, which provided in substance that a carrier receiving goods consigned to any point beyond its own line should be deemed to assume an obligation for the safe delivery of such property at its destination unless exempted or released from such duty by a contract in writing signed by the shipper or his agent. This act the railroads assailed as unconstitutional in the case of *Patterson Tobacco Co.* v. *Railway Co.* upon the ground that it was an attempted regulation of interstate commerce; but the contention was overruled, first, by the Supreme Court of Appeals of Virginia, and then by the Supreme Court of the United States. These courts held that the act in question only established a *rule of evidence* and did not interfere with the freedom of contract between the parties (92 Va. 670; 169 U. S. 311). Prior to this decision the railroads, doubtless relying upon the invalidity of this statute, had not required shippers to sign bills of lading; but, being disappointed in the result of the case, they thereafter, with one accord declined to receive any goods for transportation except on a release bill signed by the shipper. Under contracts so forced upon him the consignor found himself helpless in case of loss, and an appeal went up to the Legislature for some further action to meet the emergency. It was in response to this cry that Senator Claytor brought forward his measure. In the committee-room this bill had a number of hearings, at which leading merchants and manufacturers were present, representing not only themselves but the Chambers of Commerce, business men's leagues, and like organizations, under different names, from Richmond, Norfolk and other points. We have never seen a more lively concern for the passage of any bill than was manifested by these representative and influential citizens on that occasion. The railroads made a stubborn fight and succeeded in getting a majority of the committee against the bill, but in spite of such adverse report it passed both houses of the Legislature with little or no trouble. It is now said that the Law and Chancery Court of Norfolk has declared this act to be without constitutional authority, null and void, as respects shipments beyond the limits of Virginia, and that such decision was based upon a recent ruling of the Supreme Court of the United States in *Railway Co.* v. *Murphy.*

This *Murphy case* involved the validity of a statute of Georgia, which provided, in effect, that when any freight, shipped under a contract whereby the responsibility of each carrier ceases upon delivery to the next "in good order," has been lost or damaged, the initial carrier, on application of the shipper, shall, within 30 days, trace said freight and inform said applicant in writing when, where, how and by which carrier said freight was so lost or damaged, and the names of the parties by whom the facts can be established; and in default of compliance with such requirements, the said initial carrier is made liable for the loss or damage as if the same had occurred on its own line. The Supreme Court of Georgia, after exhaustive argument and fullest consideration, unanimously held, in an opinion by Judge Cobb, that the state legislature had a perfect right to enact such statute, and that the same was valid (116 Ga. 863; 60 L. R. A. 819). The railway company thereupon took an appeal to the Supreme Court of the United States, where the decision of the Georgia court was reversed in an opinion by Mr. Justice Peckham, who said that the information required of the receiving carrier in case of loss was an unreasonable restraint upon the freedom of contract, because the exemption contemplated by a legal agreement between the parties could not take effect except upon the terms specified in said act, which the court therefore regarded as an attempted regulation of commerce, forbidden by the Federal Constitution. (—U. S.—). Comparing the opinion of Justice Peckham with that of Judge Cobb in this case, the former does not carry entire conviction of its soundness. Indeed, in some respects, it seems quite obvious that the state court was right and the federal court wrong. More of this presently. But assuming, as we must, that the principle of that decision is correct, does it follow that the Virginia statute (Code 1904, sec. 1294*l*) is likewise unconstitutional?

The Claytor act was taken from the statutes of several other states, all of which had passed muster in the courts. The first clause of the first paragraph of said section reads as follows:

> "Whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation company issues its receipt or bills of lading in this state, the

common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss or damage or injury to such property caused by its negligence or the negligence of any common carrier, railroad or transportation company operating within any territory or state of the United States to which such property may be delivered, or over whose lines such property may pass."

This, the most important provision of our law, follows, *verbatim,* the Code of Missouri, section 944, which latter statute came under judicial investigation in the case of *McCann* v. *Eddy, Receivers, &c.,* (133 Mo. 59; 35 L. R. A. 110). That was an action for damages against the Missouri, Kansas & Texas Railway Co. for negligence in transporting a lot of cattle from Stoutsville, Missouri, to Chicago, Illinois. The eastern terminus of the defendant's road was at Hannibal, Missouri, from which point the Wabash Co. operated a road to Chicago. The cattle were delivered by defendant in due course to the Wabash Railway, on whose road the negligence complained of was committed. The contract of shipment provided, among other things, that the shipper released the defendant from the liability of a common carrier in the transportation of said stock, he agreeing that such liability should be that of a mere forwarder or private carrier for hire; and further released it from all liability of every kind after said live stock should leave defendant's road. This contract was signed by both parties. The cattle were lost on the connecting line, and in a suit brought by shipper against the initial carrier it was insisted for the latter that the defendant could not be held liable except under said statute, and that this statute was unconstitutional because an improper regulation of commerce, in that it undertook to control the contract between the parties touching an interstate shipment. The Supreme Court of Missouri, however, held otherwise. After referring with approval to *Dimmitt* v. *Railway Co.,* 103 Mo. 440, and adverting to the language of the statute that *"Whenever any property is received by a common carrier to be transferred from one place to another,"* the Court says:

"This language does not restrict, but rather recognizes, the right of the carrier to limit its contract of carriage to

the end of its own route, and there deliver the property to the connecting carrier. There can be no doubt, then, that under the statute as well as under the English law, the carrier can, by contract, limit his duty and obligation to carriage over its own route. But it seems that under the decision of the English courts, a carrier can also limit his liability to a loss or damage occurring on his own route by specific agreement that it should only be so liable."

And further on the court says:

"We cannot, therefore, give such an interpretation to the statute as would permit a carrier to contract for a through shipment, and at the same time exempt himself from liability on account of the negligence of the connecting carriers. Such an interpretation would in effect operate as a repeal of the vital provisions of the law which declare a conclusive liability in such case. The statute does not undertake to change the law in respect to liability of a carrier for his own negligence, but *to extend it to connecting carriers as well,* and declare a liability for negligence *without regard as to which was in fault.*

"Under these views of the law, no difficulty is found in giving construction to the contract. The agreement to carry from Stoutsville to Chicago is absolute and unconditional. The thirteenth condition or covenant can only be regarded as an attempt, on the part of the defendant, to relieve itself from the responsibility of answering for the negligence of the carrier by which it undertook to complete the contract. *The statute forbids such qualification of the contract.* It can only be held to relieve defendant from its common-law liability of *an insurer.* The ruling of the court in respect to giving and refusing the instructions mentioned was correct.

"We are unable to see, as contended by defendant, that the construction we give this statute makes it repugnant to that provision of the Constitution of the United States which gives to Congress alone the power to regulate commerce among states. The act in no way operates as a regulation of trade and business among states. *No burden or restriction on transportation is imposed.* Carriers are left free to make

their own contracts *in regard to compensation* for their services for transportation between the states, subject to congressional regulations. The statute merely prohibits a carrier who, by contract, undertakes to transport property to a point beyond its own route, from relieving itself of responsibility for neglect to properly perform its duty. It only imposes the duty and liability which the law, from considerations of public policy, imposes upon all common carriers in the transportation of property over their own lines, though they may extend into other states." (Italics ours.)

This case likewise went to the Supreme Court of the United States, where it was decided May 22, 1899, Mr. Justice White delivering the opinion. See 174 U. S. 580; 43 L. Ed. 1093.

It was there held:

"The Missouri statute of 1889 making a railroad company issuing bills of lading for the transportation of property liable for damages to the property caused by negligence of another railroad company over whose lines the property passes *does not curtail the power* of the company to restrict its liability by contract, to its own line, *by a restriction in unambiguous terms put into the portion of its agreement reciting the contract to carry,* and such statute is not, as affecting interstate transportation, repugnant to the federal constitution."

In the course of his opinion Justice White says:

"If the bill of lading in the case before us did not contain a positive statement of an obligation by the receiving carrier to transport from the point of shipment to the ultimate destination of the cattle, of course it would not come under the control of the statute. But as, on the contrary, the contract contains an expression of such obligation, limited by reference solely to subsequent conditions inserted in the bill of lading, it is plainly brought within the import of the statute as interpreted by the Missouri Court. It would have been within the power of the receivers of Missouri, Kansas & Texas Railway to have stipulated that the goods were received, to be transported by them from Stoutsville to the termination of the line of railway operated by the receivers and

> there to be delivered to a connecting carrier, who was to complete the transportation. If this had been done, the bill of lading would have had the plain import which the statute requires; nothing would have been left for construction, and the contract would have conveyed its obvious significance to the shipper who accepted it from the carrier."

So far as we are advised, the soundness of the decision in *McCann* v. *Eddy* was never questioned, even in the *Murphy case,* and until overruled it would seem to place the vital part of our statute beyond successful attack.

The next clause of section 1294*l*, to-wit, "and the fact of loss or damage in such case shall itself be *prima facie* evidence of negligence," is clearly unobjectionable from a legal standpoint, because it only provides *a rule of evidence,* and in *Patterson* v. *Railway Co.* the United States Supreme Court said this might be done with respect to any transaction, either local or interstate.

The next seven lines of the first paragraph of said section 1294*l* are also taken, *verbatim,* from the Missouri statute, which was upheld in the *McCann case.*

The remaining three lines of said paragraph, viz., that "no contract, receipt, rule or regulation shall exempt any such common carrier, railroad or transportation company from the liability of a common carrier which would exist had no contract been made or entered into," is extracted word for word from section 1308 of the Code of Iowa, and the constitutionality of that provision has likewise been favorably passed upon by the highest courts, state and federal. (See *Solan* v. *Railway Co.* (Iowa) 28 L. R. A. 718; *Railway Co.* v. *Solan,* 169 U. S. 133; 42 L. Ed. 688.)

The first clause of the second paragraph of said section 1294*l* reads as follows:

> "The receipt of goods destined to a point beyond the line or route of the initial carrier or the acceptance of through freight on same shall be deemed to be a contract for carriage to ultimate destination and delivery of such property at that point."

This provision, like one already examined, would seem to be nothing more than a rule of evidence. The receiving carrier is

not obliged to take goods destined beyond its own line, nor to accept a through freight charge on same. It is his privilege to confine the whole transaction to the initial road. But if for any reason he sees fit to do either of these things, then the legislature says he must be presumed to have contracted for the carriage of such property to its ultimate destination. (See *Patterson Tobacco Co.* v. *Railway Co.* and *McCann* v. *Eddy, Receiver, supra.*) It may be said that under this statute the presumption is not merely *prima facie* but conclusive, that the right to contract for a limited liability is thereby taken away, and that the state is without constitutional authority to go so far. Such view is not believed to be correct. (See 3 Am. & Eng. Enc. 542; Story on Conf. of Laws; *Pennoyer* v. *Neff*, 95 U. S. 714, 722; *R. R. Co.* v. *McCann*, 42 N. E. Rep. 769; *Ogden* v. *Saunders*, 12 Wheat. 262, 349-'50.)

The remainder of said section is a mere corollary from what has gone before, and cannot be said in any way to affect its constitutionality.

The Georgia statute, which was condemned in the *Murphy case*, is wholly unlike our Claytor law. The former undertook to make the initial road liable under certain conditions, notwithstanding it had only contracted with respect to its own line, and made no freight charge except for its own account. Hence the decision in *Railway Co.* v. *Murphy* would seem to afford no ground for setting aside the Virginia statute on this subject.

If, however, we are to consider the act in question unconstitutional, then it is quite impossible for a state legislature to enact any law having the same end in view, and with any element of efficiency, which would be at all calculated to stand the test of judicial scrutiny. But one recourse is still open, and no time should be lost by the shipper in availing himself of it. The legislature now in session can instruct our senators and representatives at Washington to introduce in Congress and press to its passage a bill drawn on the lines of the Claytor Act. Indeed, Congress can make a much better law, because that body has a free hand for such work. There ought to be no difficulty in getting it through, unless, as is sometimes charged, the railroads own the United States Senate, which we are disinclined to believe. As already shown, a number of states are committed by legislative action to

the policy of such a measure. The reasons for its adoption are founded upon common sense and have been approved alike by legislators, courts, and text writers. Commenting upon the decision in *Patterson Tobacco Co.* v. *Railway Co.,* Judge Burks said:

> "The rule established by the decisions of the federal courts and courts of last resort in most of the states, when goods are delivered to a common carrier to be transported to a particular point of destination, the liability of the carrier ceased when and as soon as he delivers the goods to the next connecting carrier, if the place of destination was beyond the line or route of the first—receiving—carrier. This rule was deemed not only inconvenient, but extremely hard on the shipper. He could seldom, if ever, know along what lines or over what routes the receiving carrier would order the transportation, and hence, if loss or damage occurred in the transportation, he would not know to which carrier to resort for indemnity, and was, in many instances, practically without any adequate redress in case of loss or of damage to his goods. It was in view of this defect in the law apparent to the most casual observer that section 1295 of the Code, following the English rule in such cases, was proposed and adopted." (I Virginia Law Register, p. 924.)

So, Judge Cobb, in the *Murphy case* says:

> "It is much easier for the initial carrier to obtain this information than it would be for the shipper. Carriers, through business arrangements with the connecting carriers, are so intimately associated with each other, and each one is so thoroughly conversant with the systems of the others, that it is much easier for a carrier to obtain this information than a shipper. In fact, it is a practical impossiblity in many instances for the shipper to obtain the information himself, and a refusal or failure on the part of the initial carrier, or one of the connecting carriers, to undertake to locate the point at which the loss or damage occurred, amounts practically to a denial of redress to the shipper of goods that have been lost or damaged. The well known fact that, as a general rule, the shippers, under such contracts, were absolutely

helpless where the goods were lost or damaged, was the motive which prompted the passage of the statute now under consideration."

In the case of *Railway Co.* v. *Washington,* 69 L. R. A. 65, decided in January, 1905, by the Supreme Court of Kansas, it was held that the checking of baggage to its destination upon a through ticket to transport the passenger over roads of initial and connecting carriers, will render the initial carrier liable for its loss on a connecting line.

After adverting to the two doctrines known as the English and the American rule, respectively, the Court says:

"As this court has not adopted either view, we are at liberty to adopt that which in our opinion is more reasonable.

"Mr. Lawson, in his treaties on the Contracts of Common Carriers, gives the reason for the two views as follows: 'In support of the first doctrine, it is argued that a different rule would work a great inconvenience. A person delivering his goods to a carrier, to be sent to a certain place, will generally rely on him alone to perform the service. He cannot be supposed to know the particular portion of the transit which the first carrier controls, much less the other owners or proprietors of the continuous line. He intends to make one contract, but not two or three or half a dozen. When he places his property in the hands of a carrier, he at once loses all control over it. If it is not delivered how is he to discover at what particular portion of the route it was lost? He would be forced to rely on the statements of the carriers themselves, who would be little likely to aid him in his search. If he did succeed in fixing the responsibility, he might find himself obliged to assert his claim against a party hundreds of miles away, and under circumstances which might well discourage a prudent man, and induce him to bear his loss rather than incur the expense and trouble of pursuing his remedy against so distant a defendant. The first carrier, on the contrary, has facilities for tracing the loss not possessed by the public. He is in constant communication with his associates in the business. He has their receipts for the property delivered to them, and with no inconvenience at all could charge the loss

to his negligent agent. In support of the second doctrine, it is simply answered that the extraordinary liabilities of common carriers cannot in justice be extended beyond their own routes, where alone they have an opportunity of choosing for themselves their servants, and of guarding the property intrusted to their care.' Lawson Contracts of Carr., sections 238-242, and cases cited. Hutchinson, Carr., 2d ed., sections 145a, 149b, and cases cited.

"We think the English doctrine more reasonable, and adopt it."

So, in 2 American and English Encyclopædia of Law (old) page 860, the editor says a consignor cannot be supposed to know who are the owners of different portions of a continuous line; that he can hope for little aid from the associated carriers in getting such information; and that, if obliged to assert his claim for compensation, in cases of loss, at a great distance, and among strangers, he will be discouraged from pursuing his legal remedy at all. The writer further says that carriers possess facilities for tracing lost packages which the consignor does not have and cannot obtain.

Do not the experience and observation of every business man satisfy him beyond all question that these things are so? Yet, Mr. Justice Peckham, in the *Murphy case,* entertains a doubt about the "fact." Whether his doubt grew out of the state of the record in that particular case (which may have been more or less defective), or was the conspring of the learned Judge's own reflection, we do not know, He says:

"We do not perceive that the initial carrier has any means of obtaining the alformation desired not open to the shipper. The railroad company, receiving the freight from the shipper, has no means of compelling the servants of any connecting carrier to answer any questions in regard to the shipment or to acknowledge its receipt by such carrier, or to state its condition when received."

If it is simply a question of "fact" whether the initial carrier has any means of information touching the loss of a consignment of goods, not equally open to the shipper, it will be no difficult

matter to settle such question in favor of the statement made by Judge Burks and others. If, as Mr. Justice Peckham says, the initial carrier cannot compel his partner, the connecting road, to answer questions, how much less can the shipper get information from either of them, except at their good will and pleasure. He is perfectly helpless. For a shipment of goods worth $50.00, and negligently lost by the carrier, he must sue first one road and then another until by chance the trouble is located, at a cost, it may be, of several hundred dollars, whereas the initial carrier could have told in the beginning just where the loss occurred. Under such conditions only large shippers can afford to demand any redress at law. These, however, are the very ones who have least occasion for such redress, because their influence with the railroads will generally insure them peculiar consideration and respect. It is the average man who suffers—the man who ships his product in small lots to distant points. He must meekly pocket his loss, or spend more than the value of the goods in a vain endeavor to get justice. This condition of things is intolerable, and ought to be abolished.

Although, for the reasons above stated, we believe that section 1294*l* of our Code is constitutional, still, if there can be a reasonable doubt as to the validity of this statute, we trust that the General Assembly of Virginia will promptly inaugurate a movement for complete relief in the premises, by demanding congressional legislation commensurate with the grievance of a long-suffering people.